No. 87-1200

IN THE

Supreme Court Of The United States

October Term, 1987

BOARD OF TRUSTEES OF ALABAMA STATE UNIVERSITY; BOARD OF TRUSTEES OF ALABAMA A&M UNIVERSITY; JOHN KNIGHT, *et al.*; and NORMALITE ASSOCIATION, *et al.*,
Petitioners

v.

AUBURN UNIVERSITY; BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA; TROY STATE UNIVERSITY; ALABAMA STATE BOARD OF EDUCATION; STATE OF ALABAMA, *et al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION SUBMITTED BY RESPONDENT, TROY STATE UNIVERSITY

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that disqualification of the trial judge was mandated by the fact that, as a private attorney and state senator, the trial judge had participated in and contributed to the events at issue in the litigation and had involved himself in the disputed evidentiary facts involved in the case.

2. Whether the court of appeals correctly held that state universities have no substantive rights and, therefore, no standing to assert claims under the Fourteenth Amendment to the Constitution of the United States or Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, against other state universities or state instrumentalities.

The petitioners also seek to raise, "conditionally," the following issue:

3. Whether the court of appeals correctly held that the district court opinion was an appealable final order where, even though the district court had ordered that a remedial plan be submitted for adoption, the opinion determined each issue in detail and left a minimum of flexibility in fashioning a remedial plan.

PARTIES

The petitioners in this Court are shown in the caption. Among the petitioners, only John Knight and the class of individual intervenors were appellees in the court of appeals. Both Alabama State University and Alabama A&M University, petitioners in this Court, were denominated as *amicus curiae* in the court of appeals. The Normalite Association, a petitioner in these proceedings, was allowed limited intervention in the district court and did not participate in the proceedings before the court of appeals. The remaining appellee in the court of appeals, the United States of America, has not sought review of the decision of the court of appeals by petition for a writ of certiorari in this Court.

The respondents in this Court, in addition to Troy State University, are Auburn University, the Board of Trustees for the University of Alabama, the Alabama State Board of Education, the State of Alabama, the Governor of the State of Alabama, the State Superintendent of Education, the Alabama Public School and College Authority, and the Alabama Commission on Higher Education. Each respondent was an appellant in the court of appeals and a defendant in the district court.

In addition, the remaining public institutions of higher education in Alabama were defendants in the district court, but were not parties to the proceedings in the court of appeals and are not respondents in this Court. These public institutions are Jacksonville State University, the University of North Alabama, the University of South Alabama, Livingston University, and the University of Montevallo.

INFORMATION REQUIRED BY RULE 28.1

Troy State University, respondent herein, is a public corporation created pursuant to Alabama Code, 1975, §§ 16-56-1 through 16-56-15. As a public corporation, Troy State University has no subsidiaries and is the subsidiary of no other corporation.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Certain constitutional provisions involved in this case, Article VI, Clause 2 of the Constitution of the United States and Amendment XIV, Section 1 of the Constitution of the United States, and certain statutes involved in this case, 28 U.S.C. § 455, are reprinted in the appendix filed with the Petition for Writ of Certiorari in this case. The following constitutional and statutory provisions are also involved in this case:

Article III, Section 2, Clause 1, Constitution of the United States:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000d:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

28 U.S.C. § 1291:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam,

and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

This action was filed by the United States on July 11, 1983 in the United States District Court for the Northern District of Alabama, naming as defendants the State of Alabama, its Governor, the Superintendent of Education, the State Board of Education, the Alabama Commission on Higher Education, the Alabama Public School and College Authority, and ten public colleges and universities (App. A). The complaint alleged violations of Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment, specifically that, prior to 1953, the State had established and maintained racial segregation in its public institutions of higher education and that, since 1953, the State had failed to eliminate the vestiges of the dual system by perpetuating discrimination in student enrollment, appointment of boards of trustees, faculty and staff hiring, and allocation of financial and other resources. The complaint further alleged that the proximity of Alabama State University to both Auburn University in Montgomery and Troy State University in Montgomery impeded the ability of Alabama State, an historically black institution, to desegregate.[1] The United States sought development of a remedial plan to eliminate the alleged vestiges of the former dual system. The case was assigned to United States District Judge U. W. Clemon.

Within weeks after the action was filed, both Alabama State and Alabama A&M, named as defendants in the complaint, moved for realignment as plaintiffs and for permission to assert claims against the other public institutions of higher education and state instrumentalities in the case (App. B, C). The claims

[1]The complaint also alleged that the proximity of Alabama A&M University to the University of Alabama in Huntsville impeded the ability of Alabama A&M, likewise an historically black institution, to desegregate.

of the realigned plaintiffs, as variously amended, were brought under 42 U.S.C. § 1983 and were predicated on substantive rights under the Fourteenth Amendment and Title VI. Alabama State maintained that the purpose of realignment, in accordance with the resolution of its board of trustees incorporated in its motion seeking realignment, was to preserve "the seniority of Alabama State University as an autonomous, full-service senior institution in the Montgomery area. . . ." (App. B). The relief sought was the merger of both Auburn University in Montgomery and Troy State University in Montgomery into Alabama State or, short of merger, a demand for increased funding and the transfer of programs and other resources from the other proximate public institutions to Alabama State (App. B).[2]

Immediately following the realignment of Alabama State and Alabama A&M, John F. Knight, Jr., and other individuals described as students, graduates, faculty, and employees of Alabama State, sought intervention as plaintiffs in the action. The Knight plaintiffs asserted claims essentially identical to the claims asserted by Alabama State and sought the same relief — merger of the Montgomery branches of Auburn and Troy State into Alabama State. The district court permitted the Knight plaintiffs to intervene and certified them as representatives of a plaintiff class.[3]

Shortly before the Knight plaintiffs moved to intervene, Auburn and the State Superintendent of Education each filed similar motions seeking that Judge Clemon be disqualified un-

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[2]Alabama A&M also sought, variously, enhancement of funding and the transfer of programs and functions from other public institutions or state instrumentalities to Alabama A&M.

[3]The class included graduates of Alabama State, black adults or minor children in Alabama presently attending, or eligible to attend, any public institution of higher education in the Montgomery area, and black citizens who were, are, or will become eligible to be employed by such institutions. The action brought by the Knight plaintiffs had originally been filed in the Middle District of Alabama. Intervention in this action was sought on the basis that the outcome in this case would be determinative of the issues in the suit as originally filed.

der 28 U.S.C. §§ 144 and 145. Judge Clemon denied these motions on several grounds, including the failure to satisfy certain technical requirements of 28 U.S.C. § 144. On petition for mandamus filed by Auburn in the court of appeals, the court determined that the technical requirements had been satisfied by a subsequent filing and directed that another judge be assigned to determine the recusal issue. *In Re Auburn University*, No. 83-7557 (11th Cir. Nov. 10, 1983). After the issue was heard before a Senior District Judge — who ordered that Judge Clemon be disqualified, but then vacated this order and recused himself — the matter was assigned to a Senior Circuit Judge. Following another hearing, the recusal motions were denied and a request by Auburn that the issue be certified for interlocutory appeal likewise was denied.

The case then proceeded in the district court before Judge Clemon. Following extensive discovery and numerous pretrial motions, including motions seeking dismissal of the claims asserted by Alabama State and Alabama A&M on the basis that these state institutions had no standing to proceed against other state institutions, the case was tried for most of the month of July, 1985.

After the conclusion of the trial, but prior to rendition of judgment by the trial court, the State Board of Education determined that certain teacher education programs at Alabama State, both undergraduate and graduate, should not be recertified. The district court, on motion by Alabama State and the Knight class (App. D), entered an injunction prohibiting decertification of these programs pending a decision on the merits in the recently-concluded trial. The State Board of Education perfected an appeal of the injunctive order in the court of appeals, denominated Appeal No. 85-7582.

While Appeal No. 85-7582 remained pending, the district court, on December 9, 1985, entered an order and opinion holding that vestiges of the former dual system remained among the public institutions of higher education and requiring that certain of the defendants formulate remedial plans. *United States v. State of Alabama*, 628 F. Supp. 1137 (N.D. Ala. 1985).

Auburn, Troy State, and the University of Alabama sought review in the court of appeals of this finding of liability, in Appeal No. 86-7090. Following denial of a stay in the district court, motions seeking a stay were filed in the court of appeals, which were granted. Alabama State, Alabama A&M, and the Knight class then sought dissolution of the stays and dismissal of the appeals in the court of appeals. Following denial of these motions in the court of appeals, Alabama State, Alabama A&M, and the Knight class sought to have the stays dissolved and the appeals dismissed by petition for a writ of certiorari in this Court, in Case No. 85-1878. After denial of these petitions, dissolution of the stays and dismissal of the appeals were again sought by application to Justice Powell. This application was likewise denied.

While Appeal No. 86-7090 from the district court order in the principal case remained pending, the court of appeals entered its opinion in Appeal No. 85-7582, the appeal by the State Board of Education of the injunction by which the district court had required the Board to certify the teacher education programs at Alabama State. The court of appeals, while affirming the injunction in favor of the Knight plaintiffs, reversed the injunction in favor of Alabama State on the basis that a state university had no substantive rights and, therefore, no standing to assert claims under the Fourteenth Amendment or Title VI against other state instrumentalities. *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986) (App. E). Alabama State unsuccessfully sought review of this decision by petition for a writ of certiorari in this Court, in Case No. 86-749.

On October 6, 1987, the court of appeals entered its decision in Appeal No. 86-7090, reversing the order and opinion of the district court and remanding for a new trial. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987). The court of appeals held, *inter alia*, that the district judge should have been disqualified and, by reference to its holding in the State Board of Education injunctive appeal, that Alabama State and Alabama A&M had no substantive rights and, therefore, no stand-

ing to assert claims under the Fourteenth Amendment or Title VI against other state universities or state instrumentalities. This petition followed.

SUMMARY OF THE ARGUMENT

There is no substantial or direct conflict between the decision of the court of appeals in this case and the decisions either of this Court or other federal courts of appeal, or other special or important reasons, justifying review on certiorari. The trial judge was properly disqualified, in a timely manner, on the basis of his prior participation in events at issue in the litigation and his involvement in the disputed evidentiary facts in this case. The decision of the court of appeals that Alabama State and Alabama A&M, both state instrumentalities, have no substantive rights under the Fourteenth Amendment or Title VI and, therefore, no standing to assert claims against other state instrumentalities, was clearly correct. Decisions which have permitted members of local school boards to sue on behalf of their students or faculty, when board members are faced with a conflict between constitutional duty and state law, have no bearing on this case. The petitioners, moreover, asserted only institutional interests in this litigation, failed to assert *jus tertii* standing in the trial court, and may not raise the issue of *jus tertii* standing for the first time on appeal. Finally, the order of the district court was clearly final and appealable.

ARGUMENT

The petitioners have failed to show that this case involves any "special and important" reasons for the issuance of a writ of certiorari. Sup. Ct. Rule 17. The opinion rendered by the court of appeals is legally sound and is not in conflict with any decision of another federal court of appeals or with any decision of this Court. Sup. Ct. Rule 17. The opinion entered by the court of appeals simply does not present any issues warranting consideration by this Court on certiorari.

I. The Trial Judge Was Properly Disqualified.

The court of appeals correctly held that disqualification of the trial judge was mandated by the fact that, as a private attorney and state senator, the trial judge had participated in and contributed to the events at issue in the litigation and had involved himself in the disputed evidentiary facts involved in the case. The respondent, Troy State University, adopts by reference the argument of the respondent, Auburn University, on the issue of recusal of the district judge.

II. The Court Of Appeals Correctly Determined That Alabama State University And Alabama A&M University Lacked Standing.

(1) Alabama State and Alabama A&M Have No Substantive Rights and, Therefore, No Standing Under the Fourteenth Amendment or Title VI.

The petitioners seek to have this Court review the determination of the court of appeals that Alabama State and Alabama A&M, as state institutions, have no substantive rights under the Fourteenth Amendment or Title VI which they have standing to assert against other state institutions. *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987). This marks the second time that petitioners have sought review on certiorari of this same holding. In an earlier appeal in this same case, *United States v. Alabama*, 791 F.2d 1450 (11th Cir. 1986), *cert. denied*, ... U.S. ..... , 107 S. Ct. 1287, 94 L. Ed.2d 144 (1987), the court of appeals determined that a state institution may not raise a Fourteenth Amendment claim against another state entity under Section 1983 or assert such a claim under Title VI. This holding constituted the law of the case and was extended to the claims of Alabama State and Alabama A&M in the subsequent appeal. 828 F.2d at 1535, n.1. The petitioners seek to have this issue, on which certiorari was previously denied in Case No. 86-749, reviewed once again.

The decision of the court of appeals is entirely consistent with a long line of decisions of this Court, commencing with

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), in which it was held that "the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government. . . ." 17 U.S. at 629. From this, there developed a series of decisions holding, generally, that state-created institutions have no standing to invoke substantive rights under certain constitutional provisions in opposition to the state or other state-created agencies or institutions. *Coleman v. Miller*, 307 U.S. 433 (1939); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907). The reason for this rule is that litigation between state agencies "amounts to a suit by the state against itself," *Rogers v. Brockette*, 588 F.2d 1057, 1065 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979), and an attack upon the "internal organization of the state's political structure," an act constitutionally prohibited. *Dartmouth College, supra.* Based on these principles, the courts have generally held that "public entities which are political subdivisions of states do not possess constitutional rights . . . in the same sense as private corporations or individuals. Such entities are creatures of the state, and possess no rights, privileges or immunities independent of those expressly conferred upon them by the state." *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301, 1307 (5th Cir. 1980); *see also, Randolph County v. Alabama Power Company*, 784 F.2d 1067 (11th Cir. 1986); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231 (9th Cir. 1980); *City of New York v. Richardson*, 473 F.2d 923 (2nd Cir. 1973); *Triplett v. Tiemann*, 302 F. Supp. 1239 (D.C. Neb. 1969).

In this case, the court of appeals correctly determined that these decisions, rather than creating a *per se* rule that a state entity never has standing to raise constitutional claims, instead are "substantive interpretations of the constitutional provisions involved. . . ." 791 F.2d at 1455, quoting *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979), *cert. denied*, 444 U.S. 827

(1979). Clearly, as the court of appeals correctly determined, neither Alabama State nor Alabama A&M, as state institutions, possess substantive rights under the Fourteenth Amendment which they have standing to assert against other state institutions under Section 1983. This Court has repeatedly held that, substantively, state instrumentalities lack standing to assert Fourteenth Amendment rights against the state or other state instrumentalities. *Coleman, supra*, at 441; *Williams, supra*, at 40. As stated in *City of Trenton, supra*, "in none of these cases was any power, right, or property of a city or other political subdivision held to be protected by the Contract Clause or the Fourteenth Amendment. This Court has never held that these subdivisions may invoke such restraints upon the power of the state." 262 U.S. at 188. *Accord, Randolph County, supra*, at 1072; *City of South Lake Tahoe, supra*, at 233; *Richardson, supra*, at 929.

The court of appeals likewise rejected, correctly, the facile suggestion that, because a political subdivision may be a "person" who may be subject to suit under Section 1983, *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1977), political subdivisions should also be considered "persons" for purposes of bringing an action under Section 1983. As stated in *Commonwealth of Pennsylvania v. Porter*, 659 F.2d 306, 327 n.3 (3rd Cir. 1981):

> States were never deemed to fall within the class of those for whom Congress created a remedy when it enacted Section 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head.

Virtually every court which has considered this issue, federal or state, has concluded that a state entity is not a "person" which may proceed under Section 1983 against another state actor. *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *Appling County v. Municipal Electric Authority of Georgia*, 621 F.2d 1301 (5th

Cir. 1980); *Buda v. Saxbe*, 406 F. Supp. 399 (E.D. Tenn. 1975); *City of South Portland v. State*, 476 A.2d 690 (Me. 1984).

Moreover, although petitioners have not expressly raised the issue, state entities clearly lack standing to assert substantive rights under Title VI for much the same reasons. Title VI provides, generally, that "no person" in the United States shall be denied the benefits of any federally-assisted program or activity on a racial basis. There is simply nothing in Title VI or its legislative history which suggests that Congress included state instrumentalities among the "persons" with substantive rights under this statute. *See also, Regents of the University of California v. Bakke*, 438 U.S. 265, 287 (1978), where this Court held that Title VI proscribes "only those racial classifications that would violate the Equal Protection Clause. . . ."

The decision of the court of appeals is sound and does not conflict with the decisions of this Court or of other courts of appeal. The result which the petitioners seek would assuredly lead to continuous and expensive litigation among state agencies, overriding legitimate state governmental decisions and conflicting profoundly with our federal system. The result would be government by injunction, a result which the petitioners may find politically desirable, but one which is plainly prohibited by the Constitution.

(2) Alabama State and Alabama A&M Lack Standing to Assert the Rights of Their Students or Faculty.

The petitioners seek to predicate standing to assert claims under Section 1983 and Title VI on a series of decisions, in this Court and in various courts of appeal, which have permitted local school boards to challenge state action by asserting the rights of their students or faculty. *See, e.g., Board of Education v. Allen*, 392 U.S. 236 (1968); *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974). Unlike this case, however, the school board members in *Allen, Hoxie, Akron*, and

similar cases had each been placed in the position of either violating state law or the constitutional rights of their students or faculty. In this case, the members of the boards of trustees of Alabama State and Alabama A&M have not claimed that state actions have placed them in the dilemma of violating either state law or the constitutional rights of their students or faculty. In the absence of a conflict between adherence to state law and constitutional duty, the basis for third party standing to assert the rights of students or faculty is likewise lacking. For this basic reason, as well as other related reasons, the conflict which petitioners purport to find between the decision of the court of appeals in this case, and decisions of this Court or other appeals courts, does not exist.

The decisions of this Court upon which the petitioners principally rely are readily distinguishable from the decision in this case. In *Board of Education v. Allen*, 392 U.S. 236 (1968), although the issue of standing was not expressly raised, this Court stated *in dictum* that the local school board members could assert First and Fourteenth Amendment challenges to a state statute on the basis of the conflict between their oath to uphold the federal constitution and their duty to comply with state law, a conflict which could result in their expulsion from office should they decline to follow the challenged state statute. No such irreconcilable conflict exists in this case — the Alabama State and Alabama A&M board members have never suggested, nor could they suggest, that they face expulsion from office or any other penalty if they comply with state law.

A second decision upon which petitioners rely, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), is distinguishable on essentially the same basis. In *Seattle School District*, although the issue of standing was not discussed, the local school board members, placed in a conflict between their duty to uphold the federal constitution and their obligation under a state statute, were permitted to mount a constitutional challenge to the state statute. A conflict of this nature simply does not inhere in this case. Moreover, any suggestion that *Seattle School District* implicitly overruled those decisions of this

Court holding that state institutions, in themselves, have no substantive Fourteenth Amendment rights is plainly untenable. Among the plaintiffs who brought the successful constitutional challenge in the *Seattle School District* case, there were a substantial number of individuals, including minority students later found to be adversely affected by the state initiative measure under attack. *Seattle School District No. 1 v. State*, 473 F. Supp. 996, 999-1000, 1011 (W. D. Wash. 1979), *aff'd in part, rev'd in part*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). In *Seattle School District*, this Court did not consider, and had no reason to consider, its settled line of cases holding that state instrumentalities have no substantive rights under the Fourteenth Amendment which they may assert against other state instrumentalities.[4]

The attempt to find a direct or substantial conflict between the decision in this case and the decisions by other courts of appeal is equally unavailing. In each of the decisions on which the petitioners rely, *Brewer v. Hoxie School District No. 46*, 238 F.2d 91 (8th Cir. 1956); *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973); *Akron Board of Education v. State Board of Education*, 490 F.2d 1285 (6th Cir.), *cert. denied*, 417 U.S. 932 (1974); and *School Board of the City of Richmond v. Baliles*, 820 F.2d 1308 (4th Cir. 1987), the local school boards were permitted to assert the rights of their students and faculty on the basis that the school board members had been placed in a position of either violating state law or the constitutional rights of their students or faculty. These conflicting duties, as previously noted, simply do not exist in this case. In both *Baliles* and *Akron*, this conflict placed the board at risk of direct economic injury or individual board members at risk of personal liability, factors which do not, and could not, exist in this case.[5] Moreover, in *Baliles*, individual plaintiffs with un-

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[4]The petitioners also allude to *Papasan v. Allain*, 106 S.Ct. 2932 (1986). In *Papasan*, individual school children were parties and the issue of standing was neither raised nor decided.

[5]The suggestion that the Sixth Circuit decision in *Akron* conflicts with the Eleventh Circuit decision in this case is further undercut by a sub-

questioned standing had been before the trial court. Furthermore, in *Hoxie*, the members of the school board brought the action against individuals and private organizations, not against other state instrumentalities.

These factors readily distinguish this case from the cases in other courts of appeal, and provide no reason to depart from the rule, as stated in *Columbus & G. Ry. Co. v. Miller*, 283 U.S. 96, 100 (1930), that ". . . the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the Amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws." There is no substantial or direct conflict between the decision of the court of appeals in this case and the decisions of this Court or other courts of appeal. *See, Singleton v. Wulff*, 428 U.S. 106 (1976); *School District of Kansas City v. State of Missouri*, 460 F. Supp. 421 (W.D. Mo. 1978).

(3) Alabama State and Alabama A&M Are Foreclosed From Asserting the Rights of Their Students or Faculty For the First Time on Appeal.

Even if Alabama State and Alabama A&M could satisfy the conditions for invoking the third party rights of their students or faculty, neither asserted *jus tertii* standing in the trial court and both are, therefore, foreclosed from raising the issue for the first time on appeal. *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986). The pleadings filed by Alabama State and Alabama A&M assert the purely institutional rights of each, and plainly fail to aver any basis for invoking the

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sequent Sixth Circuit decision, *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986), in which that court followed the settled rule in this Court that a political subdivision has no substantive Fourteenth Amendment rights which it has standing to assert against another state instrumentality.

third party rights of students or faculty (App. B, C). For instance, the policy statement of the Alabama State Board of Trustees incorporated in its motion for realignment plainly discloses that Alabama State seeks to pursue purely institutional interests, rather than the third party rights of its students or faculty (App. B). Moreover, the evidence at trial focused entirely on the institutional interests of Alabama State and Alabama A&M. *See, United States v. State of Alabama,* 628 F. Supp. 1137, 1170 (N.D. Ala. 1985). Since standing "must be distinctly and positively averred in the pleadings or should appear affirmatively and with equal distinctness in other parts of the record . . .", *Thomas v. Board of Trustees,* 195 U.S. 207, 210 (1904), both Alabama State and Alabama A&M have clearly failed to preserve this issue for review in this Court. *Warth v. Seldin,* 422 U.S. 490 (1975).

III. The Court Of Appeals Correctly Determined That The District Court Order Was Final And Appealable.

The petitioners seek to preserve for review, "conditionally," the issue of whether the order and opinion entered by the trial court was final and appealable. The petitioners, once again, seek to have this Court review an issue upon which a petition for a writ of certiorari has previously been sought unsuccessfully. This Court denied certiorari on this issue in Case No. 85-1878, after which Justice Powell denied an application on the same issue. Moreover, the decision on the merits that the district court order was final, determining everything except the details of implementation, was clearly correct and does not afford a basis for review on certiorari. *See, Brown Shoe Company, Inc. v. United States,* 370 U.S. 294 (1962); *Morales v. Turman,* 535 F.2d 864 (5th Cir. 1976), *rev'd on other grounds,* 430 U.S. 322 (1977); *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500 F.2d 1087 (6th Cir. 1974), *cert. denied,* 419 U.S. 1108 (1975); *Thoms v. Heffernan,* 473 F.2d 478 (2d Cir. 1973), *vacated on other grounds,* 418 U.S. 908 (1974).

CONCLUSION

The decision of the court of appeals entered below is not in conflict with any decision of another federal court of appeals or with any decision of this Court, and does not otherwise present any "special and important reason" for the issuance of a writ of certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF ALABAMA; GEORGE C. WALLACE, Governor of the State of Alabama; THE ALABAMA STATE BOARD OF EDUCATION; WAYNE TEAGUE, State Superintendent of Education; THE BOARD OF TRUSTEES FOR ALABAMA A&M UNIVERSITY, a public corporation; THE BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY, a public corporation; AUBURN UNIVERSITY, a public corporation; JACKSONVILLE STATE UNIVERSITY, a public corporation; LIVINGSTON UNIVERSITY, a public corporation; TROY STATE UNIVERSITY, a public corporation; THE UNIVERSITY OF MONTEVALLO, a public corporation; THE BOARD OF TRUSTEES FOR THE UNIVERSITY OF ALABAMA, a public corporation; THE UNIVERSITY OF NORTH ALABAMA, a public corporation; THE UNIVERSITY OF SOUTH ALABAMA, a public corporation;	) CIVIL ACTION NO. CV-83-C-1676-S

THE ALABAMA COMMISSION)
ON HIGHER EDUCATION; and)
THE ALABAMA PUBLIC)
SCHOOL AND COLLEGE AU-)
THORITY,)
)
Defendants .)

COMPLAINT

The United States of America, plaintiff, alleges as follows:

1. This action is brought by the Attorney General on behalf of the United States, pursuant to Sections 601 and 602 of the Civil Rights Act of 1962, 42 U.S.C. §§2000d and 2000d-1, and the Fourteenth Amendment to the Constitution of the United States.

2. This court has jurisdiction over this action pursuant to 42 U.S.C. §2000d-1 and 28 U.S.C. §1345.

I. DEFENDANTS

3. The defendant State of Alabama is a State of the United States of America.

4. The defendant Honorable George C. Wallace is Governor and chief executive officer of the State of Alabama. The Governor is ex officio a member of the Alabama State Board of Education, of the Alabama Public School and College Authority, and of the Board of Trustees of each Alabama public institution of higher education. Governor Wallace resides and has his offices in Montgomery, Alabama.

5. The defendant Alabama State Board of Education is an agency of the State of Alabama. Its members are elected by the people. This defendant is responsible for the operation of all public educational institutions in Alabama, except for those institutions which are governed by their own Boards of Trustees. The State Board of Education is now responsible for the operation of Athens State College, an upper-division, two-year institution located in Athens, Alabama. Before

1975, it was responsible for the operation of Alabama A&M University and Alabama State University, and before 1967, it was responsible for the operation of Jacksonville State University, Livingston University, Troy State University, and the University of North Alabama. The State Board of Education meets and has its offices in Montgomery, Alabama.

6. The defendant Wayne Teague is Superintendent of Education for the State of Alabama, and chief executive officer of the State Board of Education. He serves ex officio on the Board of Trustees of each of the institutions set out in paragraphs 9-16, below. This defendant resides and has his offices in Montgomery, Alabama.

7. Defendant Board of Trustees for Alabama A&M University, a public corporation, is an educational institution of the State of Alabama, located in Normal, Alabama.

8. Defendant Board of Trustees for Alabama State University, a public corporation, is an educational institution of the State of Alabama, located in Montgomery, Alabama.

9. Defendant Auburn University, a public corporation, is an educational institution of the State of Alabama. Its main campus is locted in Auburn, Alabama, and it maintains a branch campus in Montgomery, Alabama.

10. Defendant Jacksonville State University, a public corporation, is an educational institution of the State of Alabama, located in Jacksonville, Alabama.

11. Defendant Livingston University, a public corporation, is an educational institution of the State of Alabama, located in Livingston, Alabama.

12. Defendant Troy State University, a public corporation, is an educational institution of the State of Alabama. Its main campus is located in Troy, Alabama, and it maintains branch campuses in Montgomery and Dothan, Alabama.

13. Defendant Board of Trustees for the University of Alabama, a public corporation, is an educational institution of the State of Alabama. Its main campus is located in Tuscaloosa, Alabama, and it maintains branch campuses in Birmingham and Huntsville, Alabama.

14. Defendant University of Montevallo, a public corporation. is an educational institution of the State of Alabama,

located in Montevallo, Alabama.

15. Defendant University of North Alabama, a public corporation, is an educational institution of the State of Alabama, located in Florence, Alabama.

16. Defendant University of South Alabama, a public corporation, is an educational institution of the State of Alabama, located in Mobile, Alabama.

17. Defendant Alabama Commission on Higher Education (hereinafter ACHE) is an agency of the State of Alabama. Its members are appointed by the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives. It advises the Governor and the Legislature concerning the allocation of funds to the Alabama institutions of public higher education. All such institutions are prohibited by statute from establishing any new unit or program of instruction before submitting plans for such unit or program to ACHE for review and approval. No funds may be expended to establish any new unit or program which has not received the Approval of ACHE. ACHE has its offices in Montgomery, Alabama.

18. Defendant Alabama Public School and College Authority (hereinafter APSCA) is a public corporation of the State of Alabama, consisting of the Governor, the State Superintendent of Education, and the Director of Finance of Alabama. APSCA has statutory authority to provide for the construction, reconstruction, alteraton and improvement of public buildings and other facilities for public educational purposes in Alabama, including the procurement of sites and equipment therefor, and to anticipate by the issuance of its bonds the receipt of revenues appropriated and pledged by the Legislature of Alabama. APSCA has its offices in Montgomery, Alabama.

19. Each of the institutions of higher education named in paragraphs 7-16 of this Complaint, and the Alabama State Board of Education, in consideration for Federal financial assistance, have, by their agents and predecessors, agreed to comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d et seq., and with all requirements imposed by

or pursuant to the regulations of the Department of Education issued pursuant to that Title, 34 C.F.R. Part 100.

20. Title VI of the Civil Rights Act of 1964, and the regulations issued pursuant thereto, provide that no person in the United States shall, on account of race or color, be excluded from participation in, denied the benefits of, or otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Education. The regulations provide that all funded programs and activities must be conducted or operated in compliance with all requirements imposed by or pursuant to Title VI. The regulations further provide that upon determination by the Department of Education that a recipient of Federal funds is not in compliance with Title VI or the regulations issued pursuant to Title VI, the United States has the right to seek judicial enforcement of Title VI.

21. On January 7, 1981, an authorized representative of the Department of Education wrote a letter to the Governor of Alabama, informing him that the Department had found that the State of Alabama had violated Title VI by failing to eliminate the vestiges of its dual system of higher education. This letter requested that the State submit a plan for removal of those vestiges, and offered the assistance of the Department of Education in the framing of such a plan.

22. On November 30, 1981, the Governor submitted to the Department of Education a proposed Plan, which, however, was not signed by any party. In compliance with 34 C.F.R. §100.8(d), the responsible officials of the Department reviewed this Plan and determined that it was not adequate. On December 22, 1981, the Assistant Secretary for Civil Rights, Department of Education, advised the Governor that unless an acceptable desegregation plan was submitted within ten days, the matter would be referred to the Department of Justice for enforcement through appropriate judicial proceedings. Subsequently, on January 4, 1982, the Assistant Secretary, having determined that compliance could not be secured by voluntary means, sent a letter to the Assistant Attorney General for Civil Rights pursuant to 34 C.F.R. §§100.8(a) and (d), requesting that appropriate judi-

cial proceedings be brought to enforce the requirements of federal law.

II. FIRST CLAIM

23. Prior to 1953, the defendants and their predecessors, by statute, custom and usage, and pursuant to the authority granted to them by the laws of the State of Alabama, established and maintained a racially dual system of public higher education. Certain institutions in the system were limited to attendance by white students only, and others were limited to attendance by black students only, as follows:

A. The University of Alabama, in Tuscaloosa, Alabama, was established in 1831. Pursuant to the policies and practices of defendants, this institution enrolled only white students. It also enrolled only white students at its extension centers in Birmingham, which opened in 1936, and in Huntsville, which opened in 1950, both of which centers became branch campuses of the University in 1969.

B. Auburn University came under the control of the State of Alabama in 1872. Pursuant to the policies and practices of the defendants, this institution enrolled only white students.

C. The University of Montevallo was established by defendants in 1896, as The Alabama Girls' Industrial School. Enrollment in this institution was limited by statute to "any white girl or woman . . . . " Ala. School Code of 1927, §510.

D. Jacksonville State University, Livingston University, Troy State University, and the University of North Alabama were established by defendans as the State Normal Schools at Jacksonville, Livingston, Troy and Florence, respectively. These four institutions were designated by statute as being "for white teachers." Code of Alabama, Title 52, §438 (1950).

E. Alabama State University was established in 1866, as the Lincoln Normal School, and came under the control of the State of Alabama in 1874. It was subsequently known as the Normal School for Colored Teachers, Alabama School Code, §480 (1927), and as Alabama State College for Negroes, Code of Alabama, Title 52, §438 (1950).

F. Alabama A&M University was created in 1873 as the

Colored Normal School of Huntsville. In or about 1891, this institution was moved to its present location, and its name changed to the State Agricultural and Mechanical School for Negroes.

24. Pursuant to the statutes, customs and usages of the State of Alabama requiring segregation of the black and white races, the defendants employed only white persons as administrators, faculty and staff for those of the above institutions which enrolled only white students, and employed chiefly black persons as adminstrators, faculty and staff for those of the above institutions which enrolled only black students. In addition, the defendants, on the basis of race, discriminated against the institutions established for black students, *inter alia,* in the financial and other resources allocated to them and in the number and quality of educational programs provided. Defendants thereby denied black citizens educational opportunities equal to those provided by them to white citizens.

25. Since 1953, the defendants, by their policies and practices, have maintained and perpetuated the dual system of public higher education based on race, among other ways, as follows:

A. Defendants have denied qualified black applicants admission to traditionally white institutions because of their race. None of the institutions established or operated for white students as described in paragraph 23, above, ever admitted black students before 1963, with one exception; Autherine Lucy was admitted to the University of Alabama, pursuant to an order of this Court, in 1955, but was expelled shortly thereafter by the Board of Trustees, and not permitted to reenroll. Those institutions which accepted black students in 1963 did so pursuant to Court order.

B. Defendants have discriminatorily denied black persons positions on the governing boards of traditionally white institutions, and have continued to employ chiefly white persons as faculty and staff members at those institutions formerly restricted to whites, and chiefly black persons at those institutions formerly restricted to blacks. These practices have had the effect of maintaining the racial identifica-

tion of the institutions, and impeding their desegregation.

C. Defendants have provided black students with fewer opportunities than white students for public higher education, and denied them access to opportunities available to whites.

D. Defendants have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

26. As one result of defendants' racially discriminatory practices and policies of admission, faculty hiring and assignment, and provision of facilities, resources, and curricular and extra-curricular programs and activities, the institutions of the Alabama system of public higher education remain largely segregated by race, as shown by the statistics set out in Attachments A-D to this Complaint.

III. SECOND CLAIM

27. The United States repeats and realleges each of the allegations contained in paragraphs 1-25 of this Complaint.

28. Because enrollment in Alabama A&M University was restricted to blacks under the State's policy of racial segregation in higher education, a perceived need for educational opportunities for whites in the Huntsville area could not be met by that institution. The University of Alabama undertook to meet that need by offering an extension program in Huntsville, which program eventually, in 1969, became the University of Alabama at Huntsville (UAH). UAH was then, and remains, an identifiably white institution.

29. By creating a racially dual system of public higher education in the Huntsville area, defendants have impeded the desegregation of Alabama A&M.

30. By choosing to maintain racial segregation by establishing a competing institution, defendants have deprived past and present students at Alabama A&M of equal educational opportunities, on the basis of race.

31. Both Auburn University and Alabama A&M University operate programs in agricultural education and research.

32. The defendants have historically appropriated, and continue to appropriate, far greater resources to Auburn than to Alabama A&M for the support of the above-mentioned programs, because of the racial character of these institutions.

33. Various Federal statutes appropriating funds for the support of agricultural education and research programs, including among others, the Second Morrill Act, 26 Stat. 417 (Aug. 30, 1880), 7 U.S.C. §321 *et seq.*; and the Hatch Act of 1887, 24 Stat. 440 (Mar. 2, 1887), vested in the Legislature and Governor of Alabama the power to allocate these appropriations as between Auburn and Alabama A&M. These defendants have historically exercised that power to the advantage of Auburn and the disadvantage of Alabama A&M, because of the racial character of those institutions.

34. The actions of defendants set out in the foregoing paragraphs have been taken on account of the racial character of the institutions concerned, and have deprived past and present students at Alabama A&M of equal educational opportunities on account of race.

IV. RELIEF

35. Defendants have failed and refused to submit a constitutionally acceptable plan to disestablish the racially dual system of public higher education in Alabama, described in the foregoing claims, and have failed to provide specific measures to eliminate the vestiges of the dual system, including the continuing effects of their past and present discriminatory actoins, as set out above.

36. The acts and practices of the defendants and their agents maintain and perpetuate an unlawful dual system of higher education based on race, and thereby deprive black students who now attend, and prospective black students who may attend, public institutions of higher education of equal protection of the laws and equal educational opportunities, in violation of the Fourteenth Amendment to the Constitution of the United States, and of Title VI of the Civil Rights Act of 1964 and the regulatons issued pursuant

thereto. Unless enjoined by this Court, defendants will continue to deprive such black students and prospective students of the rights guaranteed them by these provisions.

WHEREFORE, the United States prays that this Court enter an order enjoining the defendants, their agents, officers, employees, successors and all persons in active concert or participation with them, from maintaining and perpetuating racial dualism in the State-supported system of higher education in Alabama. The United States prays that defendants be required to develop, submit and implement detailed plans which promise realistically and promptly to eliminate all vestiges of a dual system of higher education within the State, pursuant to the requirements of Title VI of the Civil Rights Act of 1964 and in compliance with the Fourteenth Amendment to the United States Constituion.

The United States further prays that this Court grant such additional relief as the needs of justice may require, including the costs and disbursements of this action.

WILLIAM FRENCH SMITH
Attorney General

/s/ Wm. Bradford Reynolds

WM. BRADFORD REYNOLDS
Assistant Attorney General

/s/ Frank W. Donaldson

FRANK W. DONALDSON
United States Attorney

/s/ Thomas M. Keeling

THOMAS M. KEELING
HARVEY L. HANDLEY, III
JAY P. HEUBERT
General Litigation Section
Civil Rights Division
Department of Justice
Washington, D.C. 20530

ATTACHMENT A

FULL-TIME UNDERGRADUATE ENROLLMENT
Fall, 1980

Institution	Black		White		Total
	#	%	#	%	#
Athens State	45	9.2	436	88.8	491
Auburn - Main Campus	318	2.1	14717	96.9	15195
Auburn - Montgomery	541	15.7	2881	83.4	3453
Jacksonville State	694	15.0	3864	83.3	4636
Livingston	223	27.9	545	68.3	798
Troy State - Main Campus	578	14.5	3348	84.0	3988
Troy State - Dothan	27	10.2	232	87.2	266
Troy State - Montgomery	212	40.8	293	56.3	520
U. of Alabama - Main Campus	1630	12.2	11450	85.8	13342
U. of Alabama - Birmingham	1542	24.9	4493	72.5	6193
U. of Alabama - Huntsville	119	4.7	2354	92.0	2559
U. of Montevallo	138	6.7	1878	91.6	2051
U. of North Alabama	326	8.0	3720	91.5	4065
U. of South Alabama	514	9.8	4433	84.9	5219
TOTALS, TWI'S	6907	11.0	54644	87.0	62776
Alabama A&M	2620	76.3	131	3.8	3433
Alabama State	3355	99.5	2	0.1	3372
TOTALS, TBI'S	5975	87.8	133	2.0	6805
GRAND TOTALs	12882	18.5	54777	78.7	69581

Source: National Center for Education Statistics ("NCES"), Higher Education General Information Survey ("HEGIS")

ATTACHMENT B

FULL-TIME GRADUATE ENROLLMENT
Fall, 1980

Institution	Black		White		Total
	#	%	#	%	#
Auburn - Main Campus	38	5.5	569	80.0	711
Auburn - Montgomery	58	13.6	361	84.5	427
Jacksonville State	12	12.0	77	77.0	100
Livingston	12	32.4	20	54.1	37
Troy State - Main Campus	54	15.1	291	81.5	357
Troy State - Dothan	10	5.0	188	94.5	199
Troy State - Montgomery	72	25.9	197	70.9	278
U. of Alabama - Main Campus	82	7.3	939	83.2	1129
U. of Alabama - Birmingham	143	11.8	987	81.2	1216
U. of Alabama - Huntsville	6	2.5	203	84.9	239
U. of Montevallo	3	12.5	21	87.5	24
U. of North Alabama	2	10.5	16	84.2	19
U. of South Alabama	17	5.0	299	88.5	338
TOTALS, TWI'S	510	10.1	4168	82.1	5074
Alabama A&M	93	28.2	76	23.0	330
Alabama State	192	96.5	4	2.0	199
TOTALS, TBI'S	285	53.9	80	15.1	529
GRAND TOTALS	795	14.2	4248	75.8	5603

Source: Same as Attachment A

ATTACHMENT C

FULL-TIME PROFESSIONAL ENROLLMENT
Fall, 1980

Institution	Black		White		Total
	#	%	#	%	#
Auburn - Main Campus	0	0.0	456	99.3	459
U. of Alabama - Main Campus	14	2.5	546	97.5	560
U. of Alabama - Birmingham	62	5.8	991	92.8	1068
U. of Alabama - Huntsville	3	3.5	82	95.3	86
U. of South Alabama	0	0.0	272	100	272
TOTALs	79	3.2	2347	96.0	2445

SOURCE: HEGIS data.

ATTACHMENT D

FULL-TIME FACULTY
Fall, 1979

Institution	Black		Non-Black		Total
	#	%	#	%	#
Athens State	3	7.5	37	92.5	40
Auburn - Main Campus	7	0.7	991	99.3	998
Auburn - Montgomery	7	5.1	129	94.9	136
Jacksonville State	5	1.9	257	98.1	262
Livingston	1	1.6	61	98.4	62
Troy State - Main Campus	6	2.9	204	97.1	210
Troy State - Dothan	*	*	(44)	*	*
Troy State - Montgomery	1	2.9	34	97.1	35
U. of Alabama - Main Campus	20	2.4	796	97.6	816
U. of Alabama - Birmingham	35	2.9	1164	97.1	1199
U. of Alabama - Huntsville	2	1.2	162	98.8	164
U. of Montevallo	0	0	146	100	146
U. of North Alabama	3	1.5	193	98.5	196
U. of South Alabama	18	4.1	426	95.9	444
TOTALS, TWI'S	108	2.3	4600	97.7	4708
Alabama A&M	166	66.4	84	33.6	250
Alabama State	120	69.0	54	31.0	174
TOTALS, TBI'S	286	67.4	138	32.6	424
GRAND TOTALs	394	7.7	4738	92.3	5132

Source: EEO-6 Reports for academic year 1979-80
*Not available
**Not included in totals

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CASE NO.
vs.	)	CV-83-C-1676-S
	)	
THE STATE OF ALABAMA, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSITY FOR REALIGNMENT AS PARTY-PLAINTIFF

The Board of Trustees for Alabama State University (hereinafter called "ASU") hereby moves to be realigned and treated as a party-plaintiff in this case. In support of this motion defendant ASU represents and shows unto the Court the following:

1. Complaint in this case alleges, *inter alia,* that since 1953 the defendants, by their policies and practices, have maintained and perpetuated a dual system of public higher education based on race, and have failed to take affirmative steps to remove the vestiges of the dual educational system resulting from their policy of racial segregation in education.

2. The defendant ASU, recognizing the continued existence of a racially dual system of higher education in the Montgomery geographical area, proposed, through the administrative officers of Alabama State University, in January, 1980, the merger of Auburn University at Montgomery (hereinafter "AUM") and Troy State University at Montgomery (hereinafter "TSUM") into Alabama State University under the control and governance of the Board of Trustees for Alabama State University and with the name Alabama State University.

3. By resolution adopted January 15, 1981, the defendant ASU reaffirmed merger of AUM and TSUM into Alabama State University as the most equitable and effective method to disestablish the racially dual system of higher education in Montgomery. (A copy of the resolution is attached hereto as Exhibit I, incorporated herein by reference, and made a part hereof as if herein set forth in full.)

4. Defendant ASU has thus asserted, and is asserting a right to relief similar to that sought by plaintiff.

5. Defendant ASU, through the Administrative officers of Alabama State University, has exerted every effort available to it to completely desegregate the faculty, staff and student body of Alabama State University.

6. Questions of law and fact common to defendant ASU and plaintiff will arise in this action.

7. Defendant ASU has an interest in the subject of this action in obtaining essentially the same relief demanded by plaintiff.

8. No party's rights will be adversely affected by realignment as the interest of defendant ASU coincides with that of plaintiff.

9. The interests of the co-defendants are antagonistic to the interests of the defendant ASU.

WHEREFORE, defendant ASU respectfully prays that this court take cognizance of this Motion, and after careful consideration of the matters and things set forth herein, enter an Order, pursuant to and in accordance with Federal

Rules of Civil Procedure, Rules 20 and 21, realigning defendant ASU as party-plaintiff in this action.

Respectfully submitted,
GRAY, SEAY & LANGFORD

By: /s/ Solomon S. Seay, Jr.

Solomon S. Seay, Jr.
352 Dexter Avenue
Montgomery, Alabama 36104
(205) 269-2563

Attorney for Board of Trustees for
Alabama State University

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing MOTION OF DEFENDANT BOARD OF TRUSTEES FOR ALABAMA STATE UNIVERSTY FOR REALIGNMENT AS PARTY-PLAINTIFF upon the following persons by placing copies of same in the United States Mail, first-class postage prepaid, on this the 3rd day of August, 1983:

Ira Dement
Dement & Wise
P. O. Box 4163
Montgomery, Alabama
36101

FOR: George C. Wallace
The Alabama
Commission on
Higher Education
The State of Alabama
The Alabama Public
School and College
Authority

Glenn Powell
P. O. Box 295
Tuscaloosa, Alabama 35401
and
Paul Skidmore
P. O. Box 6233
University, Alabama 35486

FOR: The University of Alabama

Charles Coody
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, Alabama 36130

FOR: Wayne Teague
Alabama State Board of Education

Thomas Thagard
P. O. Box 78
Montgomery, Alabama 36101
and
Edward Allen
Balch, Bingham, Baker, Ward, Smith, Bowman & Thagard
P. O. Box 306
Birmingham, Alabama 35201

FOR: Auburn University

Walter Merrill
500 First National Bank Building
Anniston, Alabama 36201

FOR: Jacksonville State University

J. Frederic Ingram
William F. Murray, Jr.
Thomas, Taliaferro,
Forman, Burr & Murray
1600 Bank for Savings Bldg.
Birmingham, Alabama
35203

FOR: Livingston University

Joe R. Whatley, Jr.
Donald W. Stewart
Stewart, Falkenberry &
Whatley
Suite 305
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Birmingham, AL 35203

FOR: Alabama A&M
University

Richard F. Calhoun
P. O. Box 965
Troy, Alabama 36081

FOR: Troy State University

Frank Ellis, Jr.
P. O. Box 587
Columbiana, Alabama 35051

FOR: The University of
Montevallo

Robert Potts
107 East College Street
Florence, Alabama 35630

FOR: The University of
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Maxey Roberts
The University of South
Alabama
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FOR: The University of
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Thomas M. Keeling
Harvey L. Handley, III
Jay P. Heubert
General Litigation Services
Civil Rights Division
Department of Justice
Washington, D.C. 20530

/s/ Solomon S. Seay, Jr.

EXHIBIT I

POLICY ON UNIVERSITY DESEGREGATION

WHEREAS, the U. S. Department of Education, Office of Civil Rights, has notified Governor Fob James that the State of Alabama has failed to eliminate vestiges of the former *de jure* racially dual system of higher education; and

WHEREAS, the State is given a limited time in which to submit to the Department a statewide desegregation plan; and

WHEREAS, any such plan would involve Alabama State University.

BE IT THEREFORE RESOLVED, That the Board of Trustees for Alabama State University reaffirms the position that the seniority of Alabama State Universty as an autonomous, full-service senior institution in the Montgomery area be recognized in any future desegregation plan as is now provided under the statutes of Alabama (H.B. 494, Act 79-461).

BE IT ALSO RESOLVED, That the Board focuses attention on its status as the only Montgomery-based university governance body established under Alabama statutes and calls upon the Legislature and the Governor for such additional powers and duties as would be necessary for management and control of all higher education offerings in the event of change in the governance of the Montgomery branches of Auburn University and Troy State to accommodate any plan for further desegregation, academic or economic improvement.

BE IT FURTHER RESOLVED, That in event of consolidation or merger and/or any change of identity involving Alabama State and the Montgomery branches of Auburn University and Troy State, the Board hereby calls upon the Legislature and Governor to safeguard and preserve the name "ALABAMA STATE UNIVERSITY."

Agenda Item #6

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	CV-83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
	)	
	)	
Defendants.	)	

MOTION TO REALIGN OR IN THE ALTERNATIVE FOR LEAVE TO FILE CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M) hereby moves to be realigned and treated as a party-plaintiff based on the following:

1. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, it has been denied its fair share of the capital and operation funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount, to enhance Alabama A & M so that it can attract more students of all races.

2. Likewise, the allegations of the Second Claim demonstrate discrimination against and damage to Alabama A & M. The University of Alabama in Huntsville (hereinafter "UAH") was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into

education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in education, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions in North Alabama, while leaving Auburn with those functions in South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

3. The claims of Alabama A & M are brought under 42 U.S.C. § 1981 and 1983 and the Fourteenth Amendment to the United States Constitution with subject matter jurisdiction under U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* In addition to the relief requested herein and the original Complaint, Alabama A & M requests the award of attorney's fees and such other relief as may be appropriate.

4. Alternatively, Alabama A & M moves for leave to file the cross claims attached hereto.

Respectfully submitted,

STEWART, FALKENBERRY & WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By /s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.

/s/ Donald W. Stewart
Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this the 25 day of July, 1983:

Ira Dement, Esquire
Dement & Wise
P. O. Box 4163
Montgomery, AL 36101

FOR: George C. Wallace
The Alabama Commission on Higher Education
The State of Alabama
The Alabama Public School and College Authority

Glenn Powell, Esquire
P. O. Box 295
Tuscaloosa, AL 35401

FOR: The University of Alabama

Charles Coody, Esquire
Assistant Attorney General
Department of Education
State of Alabama
Montgomery, AL 36130

FOR: Wayne Teague
Alabama State Board of Education

Solomon Seay, Jr., Esquire
Gray, Seay & Langford
352 Dexter Avenue
Montgomery, AL 36104

FOR: The Board of Trustees for Alabama State University

FOR: Auburn University

Thomas Thagard, Esquire
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Walter Merrill, Esquire
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Anniston, AL 36201

FOR: Jacksonville State University

Fred Ingram, Esquire
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Birmingham, AL 35203

FOR: Livingston University

Richard F. Calhoun, Esquire
P. O. Box 965
Troy, AL 36081

FOR: Troy State University

Frank Ellis, Jr., Esquire
P. O. Box 587
Columbiana, AL 35051

FOR: The University of Montevallo

Robert Potts, Esquire
107 East College Street
Florence, AL 35630

FOR: The University of North Alabama

Maxey Roberts, Esquire
The University of South
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Mobile, AL 36688

FOR: The University of South Alabama

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Thomas M. Keeling
Harvey L. Handley, III
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Civil Rights Division
Department of Justice
Washington, DC 20530

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO.
	)	CV 83-C-1676-S
THE STATE OF ALABAMA, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

CROSS CLAIMS

The Board of Trustees for Alabama A & M University (hereinafter "Alabama A & M") hereby files the following cross claims:

1. These claims are filed pursuant to the ancillary jurisdiction of this Court. These claims are also brought under 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment to the United States Constitution, with subject matter jurisdiction being based on 28 U.S.C. § 1343, in addition to being under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

2. Each and every allegation, claim, and request for relief in the original complaint are hereby realleged and incorporated herein by reference.

3. The racially dual system of public higher education described in the First Claim in the Complaint has discriminated against and damaged Alabama A & M, a traditionally black institution of higher education, in that, among other things, Alabama A & M has been denied its fair share of the

capital and operational funds necessary for it to carry out its mission in a manner consistent with comparable traditionally white institutions of higher education. To correct this discrimination, the Court should require the expenditure of substantial, supplemental funds, according to proof of need and amount to enhance Alabama A & M so that it can attract more students of all races.

4. Likewise, the allegations in the Second Claim of the original Complaint demonstrate discrimination against and damage to Alabama A & M. UAH was established and expanded for racially discriminatory reasons. Especially, the expansion of UAH into education, business, computer science, and other non-engineering programs has damaged Alabama A & M and limited the ability of Alabama A & M to attract students of all races. At least, UAH should be enjoined from continuing to offer programs in ducation, business, computer science, and other non-engineering areas, and from expanding into any and all other programs. Also, for racially discriminatory reasons, Auburn has been treated more favorably than Alabama A & M in all land grant functions, including but not limited to agricultural teaching and research and farm extension services. To correct this racially discriminatory treatment, the Court should order that Alabama A & M be given control of all land grant functions for North Alabama, while leaving Auburn with those functions for South Alabama. An equalization of land grant funding is necessary to effect this proper distribution of land grant functions.

5. These cross claims are brought against all other defendants to this action.

WHEREFORE, Alabama A & M request that the Court order the releif requested in the original Complaint, the relief requested in the body of this complaint, an award of

attorney's fees and costs, and such other relief as the Court may consider appropriate.

Respectfully submitted,

STEWART, FALKENBERRY &
WHATLEY
Suite 305, 2100 16th Avenue South
Birmingham, AL 35205
(205) 933-0300

By /s/ Joe R. Whatley, Jr.
Joe R. Whatley, Jr.

/s/ Donald W. Stewart
Donald W. Stewart

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing instrument has been served on the following by depositing same in the U. S. Mail, postage prepaid, on this 25th day of July, 1983:

Ira Dement, Esquire
Dement & Wise
P. O. Box 4163
Montgomery, AL 36101

FOR: George C. Wallace
The Alabama
Commission on
Higher Education
The State of Alabama
The Alabama Public
School and College
Authority

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FOR: The University of
Alabama

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Assistant Attorney General
Department of Education
State of Alabama
Montgomery, AL 36130

FOR: Wayne Teague
Alabama State Board
of Education

Solomon Seay, Jr., Esquire
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352 Dexter Avenue
Montgomery, AL 36104

Thomas Thagard, Esquire
P. O. Box 78
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FOR: The Board of
Trustees for
Alabama State
University
FOR: Auburn University

Walter Merrill, Esquire
500 1st National Bank Bldg.
Anniston, AL 36201

FOR: Jacksonville State
University

Fred Ingram, Esquire
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1600 Bank for Savings Bldg.
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FOR: Livingston University

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FOR: Troy State University

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FOR: The University of
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FOR: The University of
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Harvey L. Handley, III
Jay P. Heubert
General Litigation Services
Civil Rights Division
Department of Justice
Washington, DC 20530

/s/ Joe R. Whatley, Jr.

Joe R. Whatley, Jr.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CIVIL ACTION NO.

VS. CV-83-C-1676-S

THE STATE OF ALABAMA,
et al.,

Defendants.

MOTION AND NOTICE FOR TEMPORARY RESTRAINING ORDER

Realigned Plaintiff Board of Trustees for Alabama State University hereby moves this Court for a Temporary Restraining Order restraining and enjoining the defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, their agents, employees, successors, attorneys, and all persons in active concert and participation with them, from failing and refusing to take the necessary steps to recertify the following Education Programs at Alabama State University, pending a hearing and determination of realigned plaintiff's Motion for Temporary Restraining Order and/or Preliminary Injunction: Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisor.

Unless this motion is granted, realigned plaintiff Board of Trustees for Alabama State University will suffer immediate and irreparable injury, loss and damage if defendants are permitted to decertify the above-enumerated programs until a hearing can be had on this motion, as more fully appears from the verified Complaint attached hereto.

DATED this 13th day of August, 1985

Respectfully submitted,
/s/ SOLOMON S. SEAY, JR.
/s/ TERRY G. DAVIS
ATTORNEYS FOR
REALIGNED PLAINTIFF
BOARD OF TRUSTEES FOR
ALABAMA STATE
UNIVERSITY
732 Carter Hill Road
Post Office Box 6215
Montgomery, Alabama 36106
(205) 834-2000

NOTICE OF MOTION

TO: ALL ATTORNEYS OF RECORD FOR
DEFENDANTS IN THE ABOVE-STYLED
CAUSE

Please take notice that on the ___ day of _____, 1985 at 9:00 o'clock a.m., or as soon thereafter as counsel can be heard, the undersigned will bring the above motion on for hearing before the Honorable U. W. Clemon, United States District Judge, at the United States Courthouse, Birmingham, Alabama.

/s/ SOLOMON S. SEAY, JR.
/s/ TERRY G. DAVIS

CERTIFICATE OF COUNSEL

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I, the undersigned attorney of record for Realigned Plaintiff Board of Trustees for Alabama State University, hereby certify that a copy of the above and foregoing motion was mailed to the attorneys for all of the parties on the 13th day of August, 1985.

I further hereby certify that a copy of the above and foregoing motion was hand delivered to the Office of Attorney Charles Coody, the attorney representing defendants Alabama State Board of Education and Wayne Teague, State Superintendent of Education, and that I was advised by Mr. Coody's Office that he would be out of town until Thursday, August 15, 1985.

/s/ SOLOMON S. SEAY, JR.

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CIVIL ACTION

VS. NO. CV-83-C-1676-S

THE STATE OF ALABAMA,
et al.,

Defendants

COMPLAINT

Jurisdiction

1. This action arises under the Fourteenth Amendment to the Constitution of the United States, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. §§ 1981 and 1983, and the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000. Jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. §§ 1331, 1343(3), and 1341(4), 2201 and 2202.

Parties

2. The parties to this action are correctly enumerated in this Court's Principal Pretrial Order dated February 19, 1985; except Livingston University and the University of Montevallo, whose Rule 41(b) motions were granted.

Allegations of Fact

2. Realigned Plaintiff Board of Trustees for Alabama State University in its statement of Amended Claims, heretofore filed in this case, alleged:

"12. Exercising its authority under *Ala. Code,* Sec. 16-24-14 (1975), the defendant State Board has also prescribed minimum requirements for faculty members in programs for instructional support personnel. Approval of an institution's teacher education program is contingent upon meeting these requirements which include the following:

a. That they hold an earned doctorate, or the equivalent, with a major emphasis in the field of specialization in which the major workload is assigned;

b. That they have a minimum of three years of successful experience as a practitioner in the instructional support area in which the major workload is assigned;

c. That at least one faculty member in each instructional support area in which a program leading to certification is offered shall hold an earned doctorate with an area of specialization in that field.

"13. In May 1984, a review team appointed by the defendant State Superintendant of Education recommended that no students be admitted to the following programs at ASU because faculty members in these programs did not meet some or all of the aforegoing faculty requirements:

a. The Class A and Class AA Superintendent Program: of the two faculty members in this program at ASU, both have the appropriate doctorates, but neither has three years experience as superintendent. One faculty member with an appropriate degree and three years of experience as a superintendent is required for the Class A program; two such faculty members are required for the Class AA program.

b. The Class A and Class AA General Supervisor Program: of the two faculty members in this program at ASU, both lack the required doctoral level preparation in supervision, and both lack the three years of experience as a supervisor. One faculty member with appropriate preparation and experience is required for the Class A program; two such faculty members are required for the Class AA program.

c. The Class A and Class AA Reading Supervisor Program: of the two faculty members in this program at ASU, both have the required doctoral level preparation, but neither has three years of experience as reading supervisor. One faculty member with appropriate doctoral level preparation and three years of experience as a reading supervisor is required for the Class A program; two such faculty members are required for the Class AA program.

d. The Class A and Class AA Library Media Program: the one faculty member in this program at ASU is fully qualified, but State Board regulations require a minimum of two faculty members meeting the aforesaid requirements for the Class A program. No additional faculty member is required for the Class AA program."

3. The Amended Claims further alleged that:

"14. The State Board's requirements for faculty in programs for instructional support personnel and the recommendations of the May 1984 review team at ASU have an adverse racial impact on black students and traditionally black institutions, including ASU, and they perpetuate the vestiges of the prior *de jure* system of racial segregation at all levels of public education in Alabama. Because of historical segregation and racial discrimination against black students and black professionals, there are disproportionately few black educators who can satisfy faculty requirements for insturctional support personnel programs, namely, three years experience as a superintendent, supervisor, reading supervisor or supervisor of library media and doctoral level preparation in those specific fields of specialization."

"15. The faculty requirements for instructional support personnel programs are not necessary for the successful operation of such programs or for the successful preparation of students in those programs."

"16. The requirements for faculty in insturctional support personnel programs have both the purpose and the effect of discriminating against black students, black professionals and traditionally black institutions."

4. The Amended Claims also sought, *inter alia,* preliminary and premanent injunctions restraining and enjoining the defendants from continuing to enforce the minimum faculty requirements for instructional support personnel programs.

5. On, to-wit, the 8th day of August, 1985, the defendant State Board of Education failed adn refused to recertify the Class A and Class AA Superintendent Programs, the Class A and Class AA General Supervisor Programs, and the Class AA Reading Supervisor Program at Alabama State University, allegedly by reason of the fact that Alabama State University failed to meet the faculty experiential requirement. The Board's action had the purpose and effect of decertifying said programs after September 9, 1985. A copy of the State Board of Education's resolution is attached hereto as Exhibit 1, and incorporated herein by reference

and made a part hereof as if herein set forth in full.

6. Faculty personnel assigned to the above-named instructional support personnel programs at Alabama State University are all persons with faculty rank and tenure, and are otherwise qualified except for experiential requirements. Each is black.

7. Experiential requirements adopted by the Board, and the action of the defendant Board in decertifying the programs at Alabama State University have both the purpose and effect of discriminating against black students, black professionals and traditionally black Alabama State University.

8. Unless restrained and enjoined by this Honorable Court, the action of said Board will have the effect of depriving Alabama State University of a major portion of its Teacher Education Program, in violation of due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. §§ 1981 and 1983.

PRAYER FOR RELIEF

WHEREFORE, Realigned Plaintiff Board of Trustees for Alabama State University respectfully prays that this Court take cognizance of this Complaint for Temporary Restraining Order and for Preliminary Injunction, and after careful consideration of the matters and things set forth herein, enter Temporary Restraining Order and Preliminary Injunction:

(1) restraining and enjoining defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert and participation with them, from failing and refusing to recertify the Class A Superintendent, Class AA Superintendent, Class A General Supervisor, Class AA General Supervisor, and Class AA Reading Supervisior Programs at Alabama State University pending final hearing and determination of this claim;

(2) mandatorily requiring that the defendants State Board of Education and Wayne Teague, State Superintendent of Education, and all persons in active concert

and participation with them, recertify the Class A Superintendent, Class AA Superintendent, Class a General Supervisor, Class AA General Supervisor, and Class A Reading Supervisor Programs at Alabama State University pending final hearing and determination of the merits of this claim.

Respectfully submitted,

/s/ SOLOMON S. SEAY, JR.
/s/ TERRY G. DAVIS
ATTORNEYS FOR
REALIGNED PLAINTIFF
BOARD OF TRUSTEES FOR
ALABAMA STATE
UNIVERSITY

ADDRESS OF COUNSEL:

732 Carter Hill Road
Post Office Box 6215
Montgomery, AL 36106
(205) 834-2000

STATE OF ALABAMA)
MONTGOMERY COUNTY)

I hereby certify that I have read the foregoing Complaint, and know the contents thereof, and that the matters and things set forth therein are true and correct to the best of my knowledge, information and belief.

/s/ BEATRICE MORSE

SWORN TO AND SUBSCRIBED before me this the 13th day of August, 1985.

/s/ Solomon S. Seay, Jr.
NOTARY PUBLIC
STATE OF ALABAMA AT LARGE
MY COMMISSION EXPIRES: 2-1-89

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing COMPLAINT upon the following persons, by placing same in the United States Mail, first-class postage prepaid, on this the 13th day of August, 1985:

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Franz Marshall
Leverne M. Younger
Pauline A. Miller
Jeanne K. Pettenati
Angela Schmidt
Jeremiah Glassman
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Post Office Box 1045
Mobile, Alabama 36633

/s/ Solomon S. Seay, Jr.

[Exhibits Omitted]

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7582

United States of America, *et al.*,
Plaintiffs-Appellees,

John F. Knight, Jr., *et al.*,
Plaintiffs-Intervenors,
Appellees,

v.

The State of Alabama, *et al.*,
Defendants,

The Alabama State Board of Education;
Wayne Teague, State Superintendent of Education,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama.

[Filed June 6, 1986]

Before VANCE and JOHNSON, Circuit Judges, and ALLGOOD*, Senior District Judge.

JOHNSON, Circuit Judge:

We review here the district court's decision to enjoin the Alabama State Board of Education ("the Board") and its members from refusing to recertify certain Alabama State

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* Honorable Clarence W. Allgood, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

University (ASU) teacher education programs. We REVERSE the district court's entry of the injunction against the Board and its members on behalf of ASU, and the entry of the injunction against the Board on behalf of a class of intervening plaintiffs. WE AFFIRM the entry of the injunction on behalf of these intervenors against the Board members acting in their official capacities.

I

The injunctive order at issue here arises from a July 1983 action originally filed by the United States under 42 U.S.C.A. § 1983 and 42 U.S.C.A. § 2000d *et seq.* (Title VI) against the state of Alabama, state education authorities, and all state four-year institutions of higher education in Alabama. This suit charged that Alabama impermissibly operates a dual system of racially segregated higher education.

The court below granted the motion of Alabama State University, a majority-black institution located in Montgomery, Alabama, to realign as a plaintiff. The court also permitted John F. Knight and other faculty, graduates, employees and students at ASU ("the Knight intervenors") to intervene as plaintiffs, and certified them as representatives for a class including graduates of ASU; black adults or minor children in Alabama presently attending, or eligible to attend now or in the future, any public institution of higher education in the Montgomery area; and black citizens who were, are or will become eligible to be employed by such institutions. As a realigned plaintiff, ASU raised several additional claims, seeking chiefly to challenge Alabama State Board of Education requirements for approval of certain teacher education programs. By joint motion, these issues were severed from the main statewide action and set for later trial.

Meanwhile, during the pendency of these proceedings, the state Board voted not to recertify certain undergraduate and graduate teacher education programs at ASU. On motion by ASU and the Knight intervenors the district court enjoined the Board action to maintain the status quo pending resolu-

tion of the substantive questions before it and to preserve its jurisdiction. In reaching its decision the court below concluded that the Board's action was improperly retaliatory — that is, that the Board refused to recertify the ASU education programs in order to punish ASU for bringing suit. It is this injunctive order that comes before us for review.

II

We turn first to certain jurisdictional issues raised by appellant. The state Board argues that the district court did not have jurisdiction to grant ASU an injunction since the latter had no rights under Section 1983 or Title VI and, therefore, no standing to sue for protection of those rights. The Board does not challenge the standing of the Knight intervenors. Further, the Board of Trustees of the University of Alabama, as amicus curiae, urges that the district court was without jurisdiction to enjoin the state Board and its members since the state of Alabama and its agencies are immune from suit under the Eleventh Amendment to the United States Constitution.

Although the district court did not discuss these issues in the order before us,[1] we may examine our jurisdiction sua sponte. *In Re King Memorial Hosp., Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985). Logic dictates that parties who seek a

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[1]In its memorandum opinion in the state-wide action, however, the lower court said:

> The contention that ASU and A&M are creatures of the State of Alabama and, as such, lack standing to sue the defendants in this case requires little discussion. In *Washington v. Seattle School District No. 1*, 458 U.S. 457 [102 S.Ct. 3187, 73 L.Ed.2d 896] (1982), the Seattle, Washington School Board — no less a creature of the State of Washington than ASU and A&M are creatures of the State of Alabama — sued the State of Washington under the Fourteenth Amendment. There the Supreme Court held that the State had violated the Equal Protection Clause of the Fourteenth Amendment by the challenged legislative action. The dissent by Justice Powell never once suggested that the school board lacked standing to bring the lawsuit. Further, in the view of the court, *Monell v. NYC Dept. of Social Services*, 436 U.S. 658 [98 S.Ct. 2018, 56 L.Ed.2d 611] (1978), makes it clear that as bodies corporate, ASU and A&M are "persons" within the meaning of 42 U.S.C. § 1983.

preliminary injunction in a suit must have standing to bring suit in the first place. Thus, our first inquiry is whether ASU or the Knight intervenors had standing to sue in the original action under either Section 1983 or Title VI. Second, we must decide, since a state agency is the party enjoined, whether the latter enjoys immunity under the Eleventh Amendment.

We agree with appellant that ASU has no standing to sue under either Section 1983 or Title VI. In so doing, however, we cannot accept appellant's broad contention that ASU, as a creature of state government, has no federally protected rights whatsoever under the Constitution or laws of the United States.

A line of Supreme Court cases including, e.g., *Coleman v. Miller,* 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *Williams v. Mayor and City Council of Baltimore,* 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *City of Trenton v. New Jersey,* 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); and *Hunter v. City of Pittsburg,* 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907), stands generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator. A former Fifth Circuit case concluded from this authority that "public entities which are political subdivisions of a state" are "creatures of the state, and possess no rights, privileges or immunities independently of those expressly conferred upon them by the state." *City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1254 (5th Cir. 1976). However, the latter interpretation — which would bar any suit by a creature of the state against its creator — has not prevailed in this Court.

A subsequent Fifth Circuit decision binding on this Circuit has reviewed the Hunter line — including *Safety Harbor, supra* — and concluded that "these cases are substantive interpretations of the constitutional provisions involved; we do not think they hold that a municipality never has standing to sue the state." *Rogers v. Brockette, 588 F.2d 1057, 1068 (5th Cir. 1979), cert. denied,* 444 U.S. 827, 100 S.Ct. 52, 62 L.Ed.2d 35 (1979). The Fifth Circuit panel relied in part on the Supreme Court's statement in *Gomillion v. Lightfoot,* 364 U.S.

339, 344, 81 S.Ct. 125, 128, 5 L.Ed.2d 110 (1960), that "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the state has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the state's authority is unrestrained by the particular prohibitions of the constitution considered in those cases." *Id.*

Thus, no per se rule applies in this Circuit.[2] In assessing the standing to sue of a state entity, we are bound by the Supreme Court's or our own Court's determination of whether any given constitutional provision or law protects the interests of the body in question. However, if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked.

In the instant case, the law is clear that ASU, as a creature of the state, may not raise a Fourteenth Amendment claim under Section 1983.[3] As long ago as 1939, the Supreme Court in *Coleman, supra,* 307 U.S. at 441, 59 S.Ct. at 976 (1939) (dicta), indicated that "[b]eing but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their

---

[2]*Cf. City of South Lake Tahoe v. California Tahoe Regional Planning Agency,* 449 U.S. 1039, 1042, 101 S.Ct. 619, 621, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari). Justice White indicated that a per se rule prohibiting a political subdivision from raising constitutional objections to the validity of a state statute was inconsistent with *Board of Education v. Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), in which one of the appellants was a local board of education.

But see City of New York v. Richardson, 473 F.2d 923, 929 (2d Cir.1973); P. Bator *et al.,* Hart and Wechsler's The Federal Courts and the Federal System (2d ed.) 182 (1973), in which a per se rule is contemplated. *See also Aguayo v. Richardson,* 473 F.2d 1090, 1100 (2d Cir.1973), *cert. denied,* 414 U.S. 1146, 94 S.Ct. 900, 39 L.Ed.2d 101 (1974), for an indication of the confusion surrounding this issue.

[3]By its terms, of course, Section 1983 itself creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle,* ___ U.S. ___, 105 S.Ct. 2427, 2732, 85 L.Ed.2d 791 (1985). Thus, our focus here is directly on Fourteenth Amendment rights.

creator." See also *Town of Ball v. Rapides Parish Police Jury*, 746 F.2d 1049, 1051 n. 1 (5th Cir.1984). ASU argues, however, that since the Supreme Court has more recently determined that municipalities and other local governing bodies are "persons" who may be sued under Section 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018, 2035, 56 L.Ed.2d 611 (19770, they are logically also persons who may bring suit under this section. The former Fifth Circuit, however, has squarely rejected this argument:

> The Supreme Court's holding in *Monell* is that by enacting 42 U.S.C. § 1983, Congress intended to make municipalities and other political subdivisions amenable to suits brought under that section. The *Monell* decision does not call into question the principle that a city or county cannot challenge a state statute on federal constitutional grounds.

Appling City v. Municipal Elec. Authority of GA., 621 F.2d 1301, 1308 (5th Cir.1980), *cert. denied*, 449 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).[4] We are bound by this decision, which extends logically to other creatures of the state such as state universities. ASU thus has no standing to sue or to seek to enjoin the Alabama state board of education under Section 1983 and the Fourteenth Amendment.[5]

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[4]*See also Commonwealth of Pa. v. Porter*, 659 F.2d 306, 327 n. 3 (3rd Cir.1981) (en banc) (standing recognized on other grounds): "[S]tates were never deemed to fall within the class of those for whom Congress created a remedy when it enacted § 1983. . . . Allowing a state to bring suit, against its own instrumentalities and against its own officers, for their alleged violations, under color of state law, of federal rights belonging to the very state which it is suing, turns the statute on its head."

[5]*Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 102 S.Ct.3187, 73 L.Ed.2d 896 (1981), is not inconsistent with this position. There, a local school district challenged on Fourteenth Amendment grounds the constitutionality of a state initiative that sought to end the local school district use of mandatory bussing to achieve desegregation. The Supreme Court did not address the issue of the school board's standing to sue, although Justice Blackmun's opinion for the court did note that "[w]hile appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment." *Id.* at 487-88 n. 31, 102 S.Ct. 3203-04 n. 31.

We turn next to the question of whether ASU has a right to sue the state under Title VI. To our knowledge, no court has decided this issue.[6] We conclude that no such right of action exists.

Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C.A. § 2000d. In *Hardin v. Adams*, 760 F.2d 1158, 1163-64 (11th Cir.1985), *cert. denied sub nom. Grimmer v. Hardin*, ___ U.S. ___, 106 S.Ct. 530, 88 L.Ed.2d 462 (1985), this Court determined that state universities such as ASU are agents or instrumentalities of the state. Nothing in Title VI or its legislative history suggests that Congress conceived of a state instrumentality as a "person" with rights under this statute. Title VI provides for a comprehensive scheme of administrative enforcement, and the Supreme Court has implicitly recognized a private right of action for individuals injured by a Title VI violation.[7] Absent any indication of Congressional intent to grant addi-

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We are persuaded that *Seattle School District* may be harmonized with the conclusion of this Court that a creature of the state normally has no Fourteenth Amendment rights against its creator. The former Fifth Circuit in *Rogers* explained that the *Hunter* line "adhere[s] to the substantive principle that the Constitution does not interfere with a state's internal political organization." *Rogers*, *supra*, 588 F.2d at 1070. But *Seattle School District* does not trench on a state's political prerogatives. It simply holds that once a state's political organization in in place, the state may only re-organize that structure (such as a state's delegation of certain educational decision-making powers to local school boards) consistently with the constitutional guarantee of equal protection. *See Seattle School District*, *supra*, 458 U.S. at 479-82, 102 S.Ct. at 3199-3201.

[6]We note that at least five justices determined in *University of California Regents v. Bakke*, 438 U.S. 265, 287, 98 S.Ct. 2733, 2746, 57 L.Ed.2d 750 (1978), that Title VI proscribes only those racial classifications that would violate the equal protection clause. However, we are not persuaded by this that, because ASU has no Fourteenth Amendment rights, is necessarily has no Title VI rights. The Court's analysis in *Bakke* makes it clear that a decision on Title VI grounds is, nevertheless, distinct from an exercise in constitutional interpretation. *See id.* 438 U.S. at 281, 98 S.Ct. at 2743.

[7]*See Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 550 (1978).

tional rights under this statute to non-private state subdivisions against the state itself, we decline to infer such a right of action by judicial fiat.

Our conclusion that ASU has no standing under Section 1983 and Title VI to seek the injunction *sub judice* does not end our inquiry. The standing of the Knight intervenors remains unchallenged. Thus, we must next determine whether or not their request for a preliminary injunction against the state board of education or its members is barred by the Eleventh Amendment. We hold that injunctive relief against the Board itself is so barred, but that such relief against Board members in their official capacities is permitted.

Again, we begin our anlaysis with Section 1983. In general, the Eleventh Amendment bars suits by citizens against a state.[5] Two exceptions to this rule apply: (1) a state may consent to suit in federal court, and (2) Congress may, under certain circumstances, abrogate a state's sovereign immunity. *Atascadero v. Scanlon*, ___ U.S. ___, *105 S.Ct. 3142, 3145, 87 L.Ed.2d 171 (1985). One further doctrine, first set out in Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), permits state officials to be sued in their official capacities for prospective relief under certain circumstances, despite the Eleventh Amendment bar. *See Kentucky v. Graham*, ___ U.S. ___, 105 S.Ct. 3099, 3106 n. 14, 87 L.Ed.2d 114 (1985).

The instant case does not fall under either of the first two exceptions. Alabama has not consented to suit under Section 1983. *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1977) (per curiam). Further, the Supreme Court has held that Congress did not intend Section 1983 to abrogate a state's Eleventh Amendment immunity. *Graham, supra*, 105 S.Ct. at 3107 n. 17; *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). Thus, the Knight

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[5]The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), established that the amendment also proscribes suits by citizens against their own state.

Board could properly be enjoined under Title VI. We turn finally to a review of the injunction itself.

III

An injunction may be reversed on appeal only for abuse of discretion by the district court. *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir.1983). The Board maintains that it was prejudiced by insufficient notice and the "sudden" conversion by the district court of what was originally a temporary restraining order (TRO) proceeding into a preliminary injunction hearing.

The sufficiency of notice prior to the issuance of a preliminary injuncton is a matter left within the discretion of the trial court. *Corrigan Dispatch Co. v. Casa Guzman,* 569 F.2d 300, 302 (5th Cir.1978). In this case, the district court had no opportunity to exercise its discretion by ruling on the question of whether notice was sufficient, since appellate did not appear to object, seek a continuance, or in any other way protest the scheduling of the preliminary injunction hearing. This court generally will decline to review issues not raised in the district court. *Harris Corp. v. National Iranian Radio,* 691 F.2d 1344, 1353 (11th Cir.1982).

In any event, we are not persuaded on the merits that the one to three days' written notice (depending on which version is accurate) that appellant received of appellees' motions for injunctive relief was insufficient. Fed.R.Civ.P. 65(a), which governs notice in such cases, provides only that notice must be given; it does not specify how much notice is necessary. As appellant suggests, *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 434 n. 7, 94 S.Ct. 1113, 1121 n. 7, 39 L.Ed.2d 435 (1974), does indicate that "[t]he notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition." (In *Granny Goose,* the defendant received only same-day informal notice of the hearing by telephone.) But appellant here does not demonstrate persuasively that it was prejudiced by short notice, nor does it show how its

intervenors are barred from seeking this injunction against the state Board under Section 1983.

However, in an injunctive or declaratory action[9] grounded on federal law, parties may overcome the state's immunity by naming state officials as defendants. *Graham, supra,* 105 S.Ct. at 3107 n. 18. The intervenors' motion for a preliminary injunction satisfied this requirement by seeking to enjoin "the Alabama State Board of Education *and its members,* from failing to approve teacher training programs at Alabama State University [emphasis added]." The motion did not specify whether the intervenors sued these Board members in their official or personal capacities. Although we do not encourage such omissions, the Supreme Court has indicated that "[t]he course of proceedings will typically indicate the nature of the liability sought to be imposed." *Id.* 105 S.Ct. at 3106 n. 14; *Brandon v. Holt,* 469 U.S. 464, 105 S.Ct. 873, 877, 83 L.Ed.2d 878 (1985)

We think it clear that in this case the intervenors sought to enjoin Board members in their official capacities as state officers. The Board members' decision not to approve the teacher education programs at issue was an official action consonant with their view of official duty, not one undertaken by individuals acting independently of their offices. Thus, an act representing the execution of government policy inflicted the injury in this case and may be enjoined despite the Eleventh Amendment bar. *See Monell, supra,* 436 U.S. at 694, 98 S.Ct. at 2037.

Since we determine that the Eleventh Amendment permits the Knight intervenors to secure an injunction against state Board members under Section 1983 and the Young exception, we need not reach the difficult question of whether the

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[9]The intervenors' motion for a preliminary injunction against a state entity, of course, is not identical to an action for injunctive relief against such a body. In the latter case, the act to be enjoined is the alleged violation of federal law sued upon. In the former situation, however, the injunction may issue against an act that is not itself alleged to be a violation of law, but one that will instead disturb the status quo sufficiently to make a remedy for the violation of law doubtful. We assume, despite this distinction, that the Young exception applies similarly in both cases.

argument would have been materially different with more warning. A district court is not at leisure to permit those against whom injunctions are sought to sharpen their agruments indefinitely.

Appellant's argument that the lower court erred in converting what was originally a temporary restraining order hearing into a preliminary injunction proceeding is similarly unavailing. Again, the Board failed to complain of the alleged error to the district court. Further, since a TRO and a preliminary injunction are somewhat similar, it is not uncommon to find that the two have not been properly distinguished. *See, e.g., Fernandez-Roque v. Smith,* 671 F.2d 426, 429 (11th Cir. 1982). The former Fifth Circuit has indicated that "[w]here the opposing party has notice of the application for the temporary restraining order, such order does not differ functionally from a preliminary injunction. *Dilworth v. Riner,* 343 F.2d 226, 229 (5th Cir. 1965). In short, we cannot conclude that the conversion of a TRO hearing to a preliminary injunction hearing — particularly in the case at bar, in which appellees' motions in one way or another mentioned a preliminary injunction as well as a TRO — is so radical a procedure that it is presumptively an abuse of discretion. With no showing of actual prejudice to appellant from the conversion, we must decline to hold the district court in error.

Finally, we turn to the Board's argument that appellees failed to meet their burden of establishing a substantial likelihood that they would prevail on the merits of the controversy.[10] Specifically, appellant challenges findings made by the district court: (1) that the Board's failure to approve ASU programs was discriminatory and retaliatory,

[10] To secure a preliminary injunction, a plaintiff must establish four factors: (1) a substantial likelihood that the plaintiff will prevail on the merits, (2) a substantial threat that the plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to the plaintiff outweighs the harm to the defendant, and (4) that the grant of an injunction will not disserve the public interest. *Johnson v. United States Department of Agriculture,* 734 F.2d 774, 781 (11th Cir.1984). Before this Court appellant disputes only the lower court's conclusions on the first point.

and (2) that the faculty experience requirement for approval of teacher education programs challenged by ASU in the severed action was potentially discriminatory.

We agree that the latter finding cannot support injunctive relief since the likelihood of success on "the merits" considered there solely involves the merits of ASU's severed claims, and we have concluded that ASU has no standing to bring such claims. Further, we regard the finding of retaliatory motive by the Board as simply immaterial to the question of whether a preliminary injunction should issue, since a plaintiff in seeking such a injunction is not asked to establish, among the four factors, anything at all about the motive for the enjoined act.

Nevertheless, we hold that the trial court's entry of the preliminary injunction sought by the Knight intervenors against the Board was entirely appropriate. The purpose of a preliminary injunction is to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. *Corrigan Dispatch, supra,* 569 F.2d at 302. *See also University of Texas v. Camenisch,* 451 U.S. 390, 395, 101 S.Ct. 1830, 1834, 68 L.Ed.2d 175 (1980). Preliminary injunctive relief may be necessary to insure that a remedy will be available. *Gresham v. Windrush Partners, Ltd.,* 730 F.2d 1417, 1424 (11th Cir. 1984), *cert. denied sub nom. Windrush Partners v. Metro Fair Housing Services,* ___ U.S. ___, 105 S.Ct. 249, 83 L.Ed.2d 187 (1984). We accept as unchallenged the district court's factual conclusion that:

> [t]he total effect of the Board's non-approval of most of ASU's teacher education programs if left unredressed, will be devastating. Without new students, the College of Education will be forced to close its doors within three years. In the meantime, the college's faculty, as well as the faculty of the College of Arts and Sciences, will be displaced. The attractiveness of ASU as an unaccredited

institution, both to black and prospective white students, will be nonexistent.[11]

Given this finding by the lower court, which is entitled to substantial deference, see *Anderson v. City of Bessemer,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), it is clear that even the partial demise of ASU would impede the ability of the trial court — and this Court on review — to remedy any violation of law proved in the state-wide action originally brought by the United States and joined by the Knight intervenors. The trial judge was evidently persuaded that the intervenors had a substanial likelihood of success on the merits in the latter action, particularly since the judge, who had heard argument in the state-wide case when the injunction was entered, later held in the plaintiffs' favor. Although we do not intimate anything with respect to this Court's ultimate holding on the merits, we are satisfied that the Knight intervenors made out a case sufficient to support a preliminary injunction.

Accordingly, we AFFIRM the court's entry of this injunction, on behalf of the intervenors, against the members of the state Board in their official capacities. We REVERSE the district court's entry of any injunction on behalf of ASU, or against the state Board itself.

ALLGOOD, Senior District Judge, concurring specially:

I concur in the judgment of the court, and add the following:

No matter how artfully phrased, demands by predominately black universities, or by persons attempting to assert their interests, which draw their students, faculty and staff from predominately white market areas, for preferential treatment or status as vicarious victims of prior discrimina-

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[11] The Board at most argues that any harm to ASU resulting from the action of the former was self-inflicted — that is, that ASU provoked disapproval of its programs by its "blatantly defiant attitude toward regulations duly adopted by the State Board of Education." Whether the Board was justified in its decision not to recertify the programs at issue is again immaterial here. We simply conclude that the Board's decision, if it is not enjoined, will render a remedy in the main action meaningless.

tion, presuppose that such universities have some legally protectable interest in remaining predominately black, and that the predominately black university must be one of the mechanisms through which prior unlawful racial separation and its vestiges are corrected. State created insitutions have no such right, and the State is not limited in that way. It may well be that problems with the quality of some public educational institutions are so pervasive and ingrained that black students will be hurt, not helped by the perpetuation of those institutions.

This case could go a long way toward deciding the future of the university system in this State.

If, under appropriate standards and legal principles, liability of the State of Alabama, or any of its institutions is upheld, an issue not before us on this appeal, the District Court will be charged with approving an appropriate remedy, giving due deference to suggestions made by state authorities. *See generally Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). If, in that event, in submitting a plan the State concludes that the most effective, educationally sound, and least expensive manner to remedy a violation is to close some colleges, or to merge them under the boards of the State flagship institutions, I see no constitutional or statutory barriers to that being done. *Cf. Ayers v. U.S.,* 769 F.2d 311 (5th Cir. 1985). However, that question must be left for another day. In the meantime, all parties to this expensive suit have a duty to and should strive for a negotiated solution to it.